

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

KATHY BURNETT,

Claimant,

v.

NAPA AUTO SUPPLY, Employer, and  
STATE INSURANCE FUND, Surety

and

CUMMINS FARMS, INC., Employer,  
and STATE INSURANCE FUND, Surety,

and

AUSTINS EXPRESS, INC., Employer,  
and LIBERTY NORTHWEST  
INSURANCE CORPORATION, Surety,

Defendants.

**IC 2000-029057**

**IC 2002-521908**

**IC 2004-500545**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

April 16, 2008

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Twin Falls on September 26, 2007. Dennis R. Petersen of Idaho Falls, Idaho represented Claimant. Neil D. McFeeley of Boise, Idaho represented Defendants, Napa Auto Supply and State Insurance Fund (Napa Auto). Russell E. Webb of Idaho Falls, Idaho represented Defendants, Cummins Farms, Inc. and State Insurance Fund (Cummins Farms). W. Scott Wigle of Boise, Idaho represented Defendants, Austins Express, Inc. and Liberty Northwest Insurance Corporation (Austins Express). The parties presented oral and documentary evidence. They took post-hearing

**RECOMMENDATION - 1**

depositions and submitted briefs. The matter came under advisement on February 20, 2008 and is now ready for decision.

### **ISSUES**

As modified and agreed upon by the parties at hearing, the issues to be resolved are as follows:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident.
2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition.
3. Determination of Claimant's average weekly wage (AWW).
4. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Permanent partial impairment (PPI); and
  - b. Disability in excess of impairment.
5. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

### **CONTENTIONS OF THE PARTIES**

This is a consolidated case involving three employers and their workers' compensation sureties. It is undisputed that Claimant has sustained multiple injuries involving her neck and/or back, and that she has received benefits for industrial injuries of September 6, 2000, October 16, 2002, and December 31, 2003. Factual disputes exist as to the severity and permanent impact of each industrial injury.

Claimant contends that her lumbar injury of September 6, 2000 resulted in PPI of 5% with an additional 5% permanent partial disability (PPD); that she has 25% PPI relating to her

cervical condition with 20% PPI attributable to her injury of December 31, 2003 and the remaining 5% PPI attributable to her injury of October 16, 2002; and that Claimant's ultimate PPD is 42%, inclusive of PPI, which should be apportioned among Defendants.

Napa Auto accepted compensability for the September 6, 2000 low back injury but does not concede that the injury occurred. Impairment benefits were paid pursuant to a 5% PPI rating assigned by David A. Hanscom, M.D. However, Napa Auto contends that the rating was based on conditions that resulted either from previous back injuries or ordinary diseases of life and that no PPI or PPD resulted from the September 6, 2000 injury. Napa Auto seeks a finding on the issue of AWW and asserts that it is undisputed that Claimant earned \$6 per hour and worked 30-40 hours per week.

Cummins Farms accepted compensability for the October 16, 2002 injury and paid for medical treatment to Claimant's neck, but contends that the injury did not result in permanent impairment or disability. Cummins Farms relies, in part, on the opinion of Dr. Hanscom that Claimant reached medical stability in February 2003, without permanent impairment as a result of the October 16, 2002 injury. Cummins Farms points out that there can not be a finding of permanent disability in the absence of permanent impairment.

Austins Express accepted compensability for the December 31, 2003 neck injury and paid for cervical surgery of July 7, 2004. Austins Express initiated payment of impairment benefits based on a PPI rating of 25% (with 5% PPI apportioned to pre-existing conditions) in accordance with the initial opinion of David Simon, M.D. Austins Express subsequently provided additional medical records regarding Claimant's pre-existing cervical condition to Dr. Simon after which he concluded that Claimant's entire 25% cervical PPI pre-existed the

December 31, 2003 injury. Austins Express suspended payment of PPI benefits and contends that no additional PPI or PPD is owed as a result of the December 31, 2003 injury.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Hearing testimony of Claimant;
2. Claimant's Exhibits 1-32;
3. Defendants Napa Auto's Exhibits 1-6;
4. Defendants Cummins Farms' Exhibits A-T;
5. Pre-hearing deposition of adjuster/case manager Annette Andersen; and
6. Post-hearing depositions of vocational expert Douglas N. Crum, C.D.M.S., orthopedic surgeon David Verst, M.D., and physical medicine and rehabilitation physician David Simon, M.D.

All objections raised in the post-hearing depositions are overruled. After having considered the record and the briefs of the parties, the Referee submits the following findings of fact, conclusions of law and recommendation for review by the Commission.

### **FINDINGS OF FACT**

#### **Claimant's Background**

1. Claimant was born on March 19, 1954 and was 54 at the time of hearing. She attended high school in California but dropped out of the 9<sup>th</sup> grade to get married. At hearing, Claimant admitted to lying about her educational background in her discovery responses in this case and to multiple past employers to whom she consistently represented that she graduated from high school. Claimant explained that she lied in order to obtain employment, primarily in truck driving positions, and that she has stuck with the same story for most of her adult life.

### **RECOMMENDATION - 4**

Claimant testified that she is pursuing a GED but had not made progress towards that goal during the year preceding the hearing.

2. Prior to entering the truck driving profession in the mid 1980s and in between subsequent trucking jobs, Claimant held positions as a hotel maid, babysitter, field worker, factory worker, bank teller, cashier, and waitress. Claimant obtained a commercial drivers license (CDL) in 1985. Initial truck driving work in California included long-haul driving, transporting lumber from mills to yards, and hauling logs. Upon relocation to Idaho in the early 1990s, Claimant transported potatoes, oil, and beverages to and from California, Washington, Oregon, and Texas. Claimant hauled corn and hay during harvest season and spent at least one summer driving a dump truck and operating an asphalt loader.

3. Claimant's tax records reflect yearly gross wages from 1998 through 2004 (not including 2003 for which records were not provided) ranging from \$5,098 in 2000 to \$14,784 in 1999 with average yearly wages of \$10,713. Claimant's average yearly wages from 1998 and 1999, prior to the industrial injury of September 6, 2000, are \$11,916. Claimant's average annual wages from 1998 through 2002 were \$10,657. These amounts do not include non-wage income such as dividends or unemployment benefits.

### **Pre-Existing Injuries and Conditions**

4. Claimant sustained multiple injuries prior to September 6, 2000. Medical records and documentation regarding the previous injuries are incomplete and Claimant's recollection of the injuries is often inconsistent with existing documentation.

5. Claimant testified that she was struck in the head by a 2"x4" piece of lumber in the early to mid 1970s which resulted in on-going migraine headaches for which she has continued to refill prescriptions for Tylenol 3 and codeine. Claimant denied receiving

chiropractic treatment at any time prior to a right ankle injury she sustained while working for Giltner Trucking in March of 1998.

6. A five-page patient intake questionnaire was completed by Claimant on February 20, 1997 in which she indicated that treatment was being sought for an industrial injury sustained when she was sitting in a tractor and was struck from behind as she turned to cough. On a separate section of the form, Claimant indicated that she had seen a chiropractor for a prior back injury but that the reason for the current visit was headaches and fatigue dating back to 1976. Claimant identified multiple symptoms including neck pain, back pain, hand/finger numbness and foot/toe numbness. She responded to a request to “list any past serious accidents with dates” with “1976 - 1994 or 1995.” (Cl. Ex. 14, p.5).

7. Chiropractic chart notes from Mark Saccoman, D.C., reflect ongoing treatment from February 20, 1997 through late 1998 with a chart note of August 15, 1997 identifying low back pain resulting from “moving” and a change in treatment focus to the right foot and leg in May of 1998 relating to the Giltner Trucking industrial injury.

8. Kenneth Harris, M.D., evaluated Claimant in April of 1998 for the Giltner Trucking injury to the right ankle. He diagnosed a right ankle second degree sprain. After a follow-up visit, Dr. Harris noted ongoing reports of pain and symptoms in spite of normal objective findings on examination and normal diagnostic studies. Dr. Harris referred Claimant to David P. Murray, M.D., who found no explanation for Claimant’s diffuse pain and referred her to Dr. Saccoman for therapy, as described above.

### **September 6, 2000 Injury**

9. Claimant worked as a parts delivery driver for Napa Auto for two and a half months earning \$6 per hour. On September 6, 2000, Claimant was lifting an automobile battery when she felt pain in her lower back.

10. A Notice of Injury and Claim for Benefits was completed by Jerome Chiropractic Clinic, where Claimant was treated by Dr. Saccoman, and signed by Claimant on September 6, 2000 which reflects that Claimant experienced pain to her neck, mid-back and lower back as well as pain radiating down both legs. Dr. Saccoman's initial report also notes shoulder pain and injuries to the entire spine and lower extremities. He subsequently limited the diagnosis for the September 6, 2000 injury to a lumbar sprain/strain.

11. Dr. Hanscom evaluated Claimant on September 25, 2000 at the referral of Dr. Saccoman. Claimant's primary complaint was lower back pain but she reported that her pain "kept moving" and impacted both lower extremities as well as her neck. Dr. Hanscom diagnosed a lumbar sprain, but ordered an MRI based on radicular complaints and the possibility of a central disc rupture.

12. Upon re-evaluation on October 5, 2000, Dr. Hanscom indicated that Claimant demonstrated "total body pain" and was at extraordinarily high risk for the development of chronic pain. It was noted that physical therapy had not been initiated and that the requested MRI had not been performed. He recommended an evaluation by Elks Rehabilitation and felt that he could not do anything else for Claimant.

13. At the follow up evaluation of October 27, 2000, Dr. Hanscom noted slight improvement with diffuse soft tissue pain. He reported that he "double checked" Claimant's lumbar MRI scan and found no abnormalities and minimal degeneration throughout the lumbar

spine. No central disc rupture was present and it was determined that Claimant was not a surgical candidate. Subsequent chart notes from Dr. Hanscom regarding the need for an MRI are inconsistent with his comments of October 27, 2000. On December 7, 2000, he indicated that he was urgently requesting an MRI scan and that he needed to know “exactly what is going on” to either develop an on-going treatment plan or release Claimant to return to work. There is not a lumbar MRI report from late 2000 in the record. Dr. Hanscom’s report and assignment of PPI on February of 22, 2001 do not specifically refer to a lumbar MRI or note the need for one. However, the determination of a 5% PPI rating and notation of a “medically documented disc injury associated with minimal degenerative changes” is consistent with the description of MRI findings he reported on October 27, 2000.

14. Dr. Hanscom determined that Claimant’s medical condition was stable as of February 21, 2001, with no further work-up required. Claimant was off of medications for the September 6, 2000 injury and was released to return to work with a permanent lifting restriction of 25 pounds. Dr. Hanscom indicated he did not become aware of Claimant’s plans to pursue re-training until the February 2001 visit and had assumed that she was planning on returning to truck driving.

15. The PPI rating of 5% assigned to Claimant by Dr. Hanscom for the injury of September 6, 2000 was calculated in accordance with the 4<sup>th</sup> Edition of the *AMA Guides to Evaluation for Permanent Impairment* and is consistent with a medically documented lumbar injury resulting in pain without objective findings of structural changes as described in Table 75 of the 4<sup>th</sup> Edition of the *Guides*.

16. On March 15, 2001, Claimant returned to work for a different employer, Rangen, Inc., as a long-haul truck driver. On April 6, 2001, Claimant was asleep in the sleeper portion of



her cab which was parked along the road side near the New Mexico-Colorado border, when an unknown perpetrator broke into her cab and sexually assaulted (raped) her. A police report was completed and the injury was immediately reported to the employer. Claimant opted not to pursue a claim for workers' compensation benefits for the assault, as the injuries sustained were primarily psychological.

17. On May 10, 2001, Claimant's attorney forwarded a letter to Dr. Hanscom requesting his agreement or disagreement with the opinion of physical therapist, Dean Mayes, who felt that Claimant was not able to return to work as a truck driver because of her back pain. The opinion was requested "in order for me to obtain benefits" and Dr. Hanscom checked the "Yes" space without signature or additional comment.

18. Claimant intermittently treated with Dr. Hanscom through mid August of 2001 for flare-ups of diffuse myofascial pain.

19. Napa Auto paid \$11,154.55 in medical benefits, \$3,911.14 in temporary disability benefits for a period covering approximately 24 weeks from September 7, 2000 through February 22, 2001, and \$6,476.25 in impairment benefits based on the 5% PPI rating.

#### **October 16, 2002 Injury**

20. Claimant worked as a seasonal farm truck driver for Cummins Farms for approximately six months. Her employment involved driving a semi-truck along rows in the field to receive harvested potatoes. On October 16, 2002, Claimant was injured when she turned her steering wheel to move her truck into the next row of the field and felt pain between her shoulder blades. Claimant confirmed at hearing that she was not turning a corner and turned the steering wheel just enough to shift to the next row. (Tr. p. 149 l. 14 through p.150 l. 6).

21. Initial treatment was sought with Dr. Saccoman on October 16, 2002 at which time Claimant was diagnosed with injuries to her entire spine and right shoulder. The mechanism of injury described by Dr. Saccoman differs from Claimant's description and indicates that Claimant was backing up a truck with power steering problems when she hit a large rut and felt her entire spine twist.

22. Randall J. Slickers, M.D., evaluated Claimant on October 29, 2002 and November 12, 2002 at the referral of Dr. Saccoman and diagnosed a cervical sprain. Dr. Slickers recommended physical therapy and agreed to refer Claimant to Dr. Hanscom. Dr. Slickers initially described Claimant as having "a bit of a chip on her shoulder" and provided a final analysis of "extremely chronic pain syndrome."

23. Dr. Hanscom assumed care for Claimant's injury on November 14, 2002 at which time he ordered diagnostic studies and physical therapy. A cervical x-ray revealed degenerative changes and a cervical MRI of December 14, 2002 demonstrated multi-level degeneration with osteophytes at C7 causing stenosis of the neural foramen. Dr. Hanscom explained that Claimant's pathology did not match a C7 radiculopathy and that Claimant's symptoms were myofascial with chronic pain issues.

24. Claimant was certified by Dr. Hanscom as having reached medical stability on February 1, 2003, without permanent impairment or work restrictions. Although Dr. Hanscom noted slight improvement with shoulder symptoms at a subsequent visit, he continued to maintain Claimant's date of medical stability as February 1, 2003.

25. No medical service provider has assigned a permanent impairment rating attributable to the October 16, 2002 injury. Dr. Simon subsequently opined that Claimant's

cervical impairment pre-existed her injury of December 31, 2003, but did not relate Claimant's pre-existing problems to a specific injury or incident.

26. Cummins Farms paid \$6,722.93 in medical benefits and \$3,842.79 in temporary disability benefits for a period covering approximately 15 weeks.

27. On August 5, 2003, Claimant underwent an independent medical evaluation by a physical medicine and rehabilitation specialist, Eric C. Roberts, M.D., at the request of her attorney. Dr. Roberts reviewed past medical records, evaluated Claimant and addressed Claimant's previous work related injuries. He determined that Claimant's "unusual physical examination findings and complaints" could not be easily attributed to the April 1998 right ankle injury, the September 2000 back injury or the October 2002 neck injury. Rather, he suspected that Claimant may suffer from an underlying disorder such as fibromyalgia, rheumatologic disorder, metabolic disorder or an endocrine disorder. Additionally, he felt that the post-traumatic stress of the sexual assault in March 2001 and lack of treatment for the assault might be impeding Claimant's recovery from her physical complaints. He opined that Claimant was not "crazy" but, rather, that there may be an undiagnosed systemic problem contributing to her ongoing symptoms.

28. Dr. Roberts specifically addressed Claimant's cervical MRI of December 14, 2002 and explained that the findings were consistent with common developmental findings and not necessarily reflective of impairment due to an injury.

#### **December 31, 2003 Injury**

29. Claimant worked as a long-haul truck driver at Austins Express for approximately two months. On December 31, 2003, Claimant slipped and fell on ice while in the parking lot of

Seneca Foods in Buhl, Idaho. The injury was promptly reported by Claimant and compensability was accepted by Austins Express.

**Dr. Stagg**

30. Initial medical treatment was sought with Douglas Stagg, M.D., on the date of injury at which time “multiple trauma” was diagnosed. Claimant reported improved symptoms with persistent right-sided and shoulder discomfort as of January 4, 2004. Radicular complaints waxed and waned.

31. A clinic note from Dr. Stagg of January 28, 2004 documents an increase in Claimant’s symptoms and onset of right arm paresthesias as the result of removing tire chains from six tires on January 26, 2004. Claimant’s previous treatment with Dr. Hanscom for her neck is documented by Dr. Stagg for the first time in this clinic note, but the note reflects that Claimant “mentioned *when I initially saw her* that she had some prior neck problems and a prior work comp injury regarding her neck.” Subsequent reports from Dr. Stagg continue to identify Claimant’s injury as the slip and fall on ice, as opposed to the removal of tire chains. Similarly, subsequent physicians who evaluated Claimant do not relate Claimant’s symptoms to the removal of tire chains on January 26, 2004. Dr. Stagg ordered an MRI.

32. A cervical MRI of February 14, 2004 revealed multi-level degenerative changes and a large broad based disc protrusion at C6-7. Dr. Stagg diagnosed persistent right-sided neck pain with C6-7 radiculopathy in addition to the MRI findings and referred Claimant to Dr. Verst for a surgical consultation.

**Dr. Verst**

33. Dr. Verst is a board certified orthopedic surgeon who initially evaluated Claimant on February 24, 2004. Dr. Verst made referrals for conservative treatment in the form of

physical therapy, work hardening and epidural steroid injections. Claimant's condition did not resolve with conservative treatment and Dr. Verst recommended surgical intervention.

34. Dr. Verst performed a decompression and fusion at C5-C7 with allograft on July 7, 2004. Claimant received post-operative care at the direction of Dr. Verst and reached maximum medical improvement on March 15, 2005.

35. Claimant's post-operative diagnostic studies, including an EMG/NCV study of February 23, 2005, were negative for radiculopathy, myelopathy or neuropathy. A post surgical MRI of January 8, 2005 was interpreted by Dr. Verst as "grossly normal." Dr. Verst referred Claimant to an independent physician for assignment of an impairment rating because he could not correlate her subjective complaints with the normal objective findings. The evidence does not reflect that Claimant was ever assigned an impairment rating by a physician seen at Dr. Verst's referral. Dr. Verst did not address the 25% PPI rating subsequently assigned by Dr. Simon, or give an opinion regarding a percentage of permanent impairment attributable to the injury of December 31, 2003.

36. Dr. Verst opined that Claimant would not have been a surgical candidate in February of 2002, based on her prior cervical MRI. He explained that the need for cervical surgery, within reasonable medical probability, was the injury of December 31, 2003 and explained that Claimant's description of radicular symptoms following the 2003 injury was indicative of C7 radiculopathy which was consistent with the February 14, 2004 MRI findings.

37. Dr. Verst did not make note of Claimant mentioning her previous neck treatment with Dr. Hanscom and did not recall questioning her about previous injuries. Dr. Verst's initial opinion regarding causation did not take Claimant's previous cervical medical treatment and complaints into consideration, but his opinion was unchanged at the time of his post-hearing

deposition by which time he had reviewed Claimant's 2002 cervical MRI and the records of Dr. Hanscom.

**Dr. Simon**

38. Claimant was evaluated by Dr. Simon on April 19, 2005 at the request of Austins Express. Dr. Simon is a physiatrist who specializes in physical medicine and rehabilitation. Claimant completed a questionnaire at the outset the evaluation at which time Claimant reported experiencing "total disability" and denied a history of similar problems or previous work injuries. Claimant represented to Dr. Simon, at the time of her examination, that she did not have prior neck problems. However, Dr. Simon summarized medial records reviewed at the time of his initial evaluation and made note of comments in Dr. Stagg's report of January 28, 2004 which reference Claimant's previous workers' compensation injury to her neck, previous cervical MRI and treatment with Dr. Hanscom. Dr. Simon initially concluded that Claimant's cervical and upper extremity problems were the result of the December 31, 2003 injury.

39. Dr. Simon utilized the 5<sup>th</sup> Edition of the *AMA Guides to the Evaluation of Permanent Impairment* to calculate Claimant's PPI. He provided an initial PPI rating of 18% utilizing the range of motion (ROM) model as opposed to the diagnosis related estimate (DRE) method and referenced Section 15.8 (p.398) of the *Guides* which indicates that the DRE method is preferred, but that the ROM method is appropriate when there is multi-level involvement in the same area of the spine. He explained that he utilized the ROM method because Claimant underwent a multi-level fusion to the cervical spine. In doing so, Dr. Simon combined Claimant's range of motion impairment of 8% with specific spine disorder impairment of 10% pursuant to Table 15-7 (p.404). Dr. Simon described his range of motion calculations in detail and explained that Claimant's impairment for specific disorders was determined based on multi-

level surgically treated disc lesion of the cervical spine, with residual medically documented pain and rigidity. However, it appears that a mathematical or typographical error was made because Dr. Simon represents that 10% for the diagnostic criteria combined with 8% for range of motion deficits equals 18%, when using the combined values chart on page 604 of the *Guides*. Application of the combined values chart actually results in a whole body PPI rating of 17% when combining 10% with 8%. Dr. Simon's decision to apply the combined values chart is not unreasonable under these facts, so long as it is applied correctly.

40. Dr. Simon then substituted a PPI rating of 25%, explaining that Claimant meets the criteria for a DRE cervical category IV impairment and that the higher rating should be selected whenever both the ROM method and DRE method may be used. Dr. Simon did not articulate the basis of his determination that Claimant has DRE cervical category IV impairment.

41. Dr. Simon explained in his initial report that 80% of Claimant's permanent cervical impairment was attributable to her industrial injury, with 20% apportioned to her pre-existing degenerative disc disease. He determined that Claimant's PPI attributable to the December 31, 2003 injury was 20% (80% of 25% PPI).

42. Dr. Simon reviewed additional medical records regarding Claimant's pre-existing medical treatment and issued an addendum report of August 10, 2006. Dr. Simon concluded that the history previously provided to him by Claimant was "significantly inaccurate" and that Claimant's subjective symptoms should be discounted because Claimant could not "be trusted to provide a reliable description." Based on all information available to him as of August 2006, he revised his opinion regarding causation of Claimant's cervical and right arm problems to assert that the injury of December 31, 2003 would, at most, have caused a temporary exacerbation of Claimant's pre-existing problems.

43. During his post-hearing deposition, Dr. Simon maintained that his opinion regarding the existence of Claimant's 25% PPI, but concluded that none of the PPI was attributable to the injury of December 31, 2003.

44. Austins Express paid \$64,077.89 in medical benefits, \$16,344.62 in temporary disability benefits for a period of approximately 42 weeks, and \$22,028.60 in permanent partial impairment benefits for a period of 76 weeks which is consistent with 15% PPI, plus one week.

### **Return to Work**

45. Both Dr. Verst and Dr. Simon commented on Claimant's permanent work restrictions. Dr. Simon felt that Claimant should avoid heavy or repetitive overhead work because of her cervical fusion and that she was precluded from performing heavy manual labor because of her age and poor conditioning. Dr. Verst indicated that Claimant had a permanent lifting restriction and should limit lifting of 35-50 pounds to an occasional or rare basis. He explained that there was nothing from an objective standpoint to preclude Claimant from returning to work as a truck driver.

46. Claimant underwent a functional capacity evaluation (FCE) on March 27, 2007 with Tracy Becerra, RPT, which revealed that Claimant could perform sedentary work for 8 hours per day/5 days per week. However, the results of the FCE were considered invalid and Ms. Becerra concluded that, due to Claimant's self limiting behavior, the FCE reflected what Claimant was willing to perform on that day and did not necessarily reflect Claimant's maximum safe work capacity.

47. Following recovery from the cervical surgery of July 7, 2004, Claimant returned to work briefly for Blockbuster Video and subsequently obtained employment at Dollar Tree



Store as a cashier/department manager earning \$8 per hour. Claimant was working 25 - 40 hours per week at the time of hearing.

48. Douglas N. Crum, C.D.M.S., is a vocational rehabilitation expert hired by Claimant to evaluate factors relating to disability in excess of impairment. Mr. Crum reviewed medical records and interviewed Claimant on April 7, 2007. Mr. Crum described Claimant as an extremely poor historian and made note that her subjective complaints reflected that she has very little accurate insight into human physiology/anatomy.

49. Mr. Crum calculated a 33% reduction in labor market access as a result of the December 13, 2003 injury and on restrictions provided by Dr. Verst in March of 2005 which indicate that Claimant is able to lift and carry 10 pounds continuously, lift up to 20 pounds frequently, and lift up to 35 pounds occasionally.

50. Mr. Crum calculated a 42-48% reduction in earning capacity by comparing her wages of \$620 per week at Austins Express with earning \$8-\$9 dollars per hour for 40 hours per week at the Dollar Tree Store. Mr. Crum did not review Claimant's financial records or other documentation regarding her pre-injury wages.

51. Mr. Crum opined that Claimant's permanent partial disability is 42%, based on restrictions provided by Dr. Verst in March 2005. He concluded that Claimant could not likely successfully compete for trucking jobs that were within her restrictions.

#### **DISCUSSION AND FURTHER FINDINGS OF FACT**

52. **Credibility.** Claimant's credibility is negatively impacted by multiple factors. Claimant's testimony regarding her past medical treatment to her neck and back was inconsistent with the medical records. Although Claimant's admitted misrepresentation about her educational background is only tangentially relevant to the disputed issues and understandable in the context

described by Claimant, it establishes that Claimant is willing to misrepresent facts when there is a likely impact to her financial livelihood.

53. The Referee observed Claimant's demeanor during hearing. She appeared physically uncomfortable before the hearing began, but appeared to become more comfortable during direct examination as she focused on the questions instead of her physical condition. She exhibited mild physical distress during and immediately before and after break, in the hearing. She was easily led by questions to the point of providing inconsistent testimony. She occasionally hesitated before answering some questions, which hesitation appeared to be prompted by her desire to anticipate the impact of an answer or the direction in which follow-up questions might go. This hesitation was distinct from her hesitation caused by inability or difficulty in her recollection of events.

54. Physicians who have evaluated Claimant consistently note reports of prolonged pain and symptoms that are not explained by diagnostic studies or objective evidence. The response of these physicians is varied. Dr. Hanscom and Dr. Slickers diagnosed chronic pain syndrome; Dr. Roberts suggested the possibility of an undiagnosed systemic disorder and Dr. Verst referred Claimant to an alternate physician to assess Claimant's impairment. Similarly, physicians have reacted differently to Claimant's omissions and/or inaccurate representations about previous injuries or treatment. Dr. Verst admitted that he would have preferred to have known about Claimant's medical history at the onset of his treatment, but did not alter his opinion regarding causation of Claimant's symptoms or his recommendation for surgical intervention. Dr. Simon felt that the inaccurate information provided by Claimant was misleading and invalidated his initial opinion regarding causation of Claimant's impairment.

55. The evidence establishes that Claimant is a poor historian and likely prone to reports of symptoms that are out of proportion to physical findings. Although these factors make it challenging to weigh the medical evidence, they do not invalidate the existence of injuries sustained by Claimant on September 6, 2000, October 16, 2002 and December 31, 2003.

56. **Causation.** A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). “Probable” is defined as “having more evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). An employee may be compensated for the aggravation or acceleration of a pre-existing condition, but only if the aggravation results from an industrial accident as defined by Idaho Code § 72-102(17).

57. In the present case, medical records establish that Claimant sustained previous injuries to her neck and back and that degenerative changes were present in her cervical spine that likely pre-existed the October 16, 2002 injury. Both the injury of September 6, 2000 and October 16, 2002 resulted in soft tissue injuries that did not cause or aggravate Claimant’s pre-existing condition.

58. Claimant’s injury of December 31, 2003 was sufficient to aggravate her pre-existing cervical condition. It caused the need for the cervical surgery of July 7, 2004. The opinion of Dr. Verst on this issue is credible and supported by the evidence.

59. **Permanent Partial Impairment (PPI).** “Permanent impairment” is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. “Evaluation (rating) of permanent impairment” is a

medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

60. Claimant's lumbar strain/sprain injury of September 6, 2000 resulted in 5% PPI as determined by Dr. Hanscom.

61. Claimant sustained strain/sprain injuries to her cervical spine and right shoulder on October 16, 2002 which resolved by March 2003 and is not causally related to her subsequent injuries and symptoms. There is no medical evidence establishing that Claimant's injury of October 16, 2002 caused the cervical MRI findings of December 14, 2002 or that Claimant's pre-existing degenerative changes and osteophytes were aggravated by the injury of October 16, 2002. Claimant does not have PPI attributable to her injury of October 16, 2002.

62. The determination of PPI attributable to the injury of December 31, 2003 is complicated by the fact that Dr. Simon is the only doctor to perform an impairment rating evaluation after Claimant's surgery and because his assignment of a DRE cervical category IV rating is not supported by his own reports or other medical evidence. As described in preceding paragraphs 39 and 40, Dr. Simon disregarded his ROM method calculation in favor of a 25% rating based on DRE cervical category IV as described on page 392 of the 5<sup>th</sup> Edition of the *Guides*, without explanation of why Claimant falls into this impairment category.

63. Cervical category IV is applicable when a claimant has a fracture of a cervical vertebrae with more than 50% compression, alteration of motion segment integrity (defined with

specific radiographic criteria), or radiculopathy that is either multi-level or bilateral. (*Guides*, p.392). There is nothing in the evidence to suggest that Claimant has ever been diagnosed with alteration of motion segment integrity or a compression fracture. In his initial report, Dr. Simon diagnosed a C6-7 herniation with right cervical radiculopathy which is neither multi-level nor bilateral. Dr. Verst testified that Claimant had no objective findings of radiculopathy based on the normal EMG/NCV study of February 23, 2005. Although the *Guides* provide an example of a claimant being properly assigned a 25% PPI following a cervical fusion, the example is specifically based on impairment due to alterations of motion segment integrity. (*Guides*, p.394).

64. It is perplexing that Dr. Simon would assign 25% PPI and maintain his opinion without medical explanation. This is especially true in light of his eventual opinion that Claimant's subjective complaints should be disregarded and that none of Claimant's impairment is attributable to the injury of December 31, 2003. In light of the absence of diagnostic evidence of radiculopathy and Dr. Simon's specific finding of the lack of "credible dermatomal sensory or motor loss", the highest DRE cervical category supported by the evidence is category II which yields a range of 5%-8% PPI. (*Guides*, p.392) Accordingly, Claimant's PPI is higher based on Dr. Simon's well explained calculation of PPI calculated pursuant to the ROM model.

65. Claimant's injury of December 31, 2003 resulted in 17% PPI as initially determined by Dr. Simon utilizing the ROM method, which reflects a typographical/mathematical correction as described in preceding paragraph 39.

66. Claimant's pre-existing cervical treatment is relevant and the evidence establishes that degenerative changes were present in Claimant's cervical spine prior to the injury of December 31, 2003. However, the 17% PPI rating is based on Claimant's surgery of July 7, 2004 and residual range-of-motion deficits. Because the injury of December 31, 2003

aggravated Claimant's pre-existing degenerative changes and resulted in the need for cervical surgery, apportionment of the 17% PPI rating due to pre-existing degenerative changes is not appropriate.

67. **Permanent Partial Disability (PPD).** The burden of proof is on Claimant to prove the existence of any disability in excess of impairment. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). "Evaluation (rating) of permanent disability" is an appraisal of the Claimant's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent non-medical factors provided for in Idaho Code § 72-430. Idaho Code § 72-425. Although concepts of PPI and PPD are conceptually distinct, there must be a finding of impairment in order for disability to exist. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

68. Claimant's injury of September 6, 2000 did not prevent Claimant from returning to truck driving and the evidence fails to establish that Claimant is entitled to disability in excess of impairment as the result of her lumbar sprain/strain injury and non-medical factors. Dr. Hanscom's indication in May of 2001 that Claimant was unable to return to truck driving is inconsistent with his previous reports and with the fact that Claimant returned to truck driving in March of 2001.

69. Because Claimant failed to establish the existence of PPI resulting from her injury of October 16, 2002, she cannot establish disability in excess of impairment attributable to that injury.

70. The opinion of Mr. Crum regarding permanent disability is not persuasive. Most significantly, Mr. Crum's determination of Claimant's pre-injury earning capacity is inflated and not representative of Claimant's actual pre-injury earnings. As summarized in preceding

paragraph 3, Claimant's average wages were \$10,657 per year (or \$204.95 per week) from 1998 through 2002. Claimant failed to establish either consistent employment or wages during 2003, prior to going to work for Austins Express in late October. Claimant's past work history reflects seasonal employment with few jobs lasting more than three months. The evidence does not support a pre-injury wage earning capacity of \$620 per week as identified by Mr. Crum. Claimant's earnings at the time of hearing were \$8 per hour for 30 hours per week (\$240). This amount exceeds Claimant's average earnings during the five years preceding her injury in 2003. Further, the medical evidence does not limit Claimant's work to 30 hours per week and Claimant is working less than 40 hours per week for reasons unrelated to her cervical injury.

71. The medical restrictions relied upon by Mr. Crum in determining Claimant's loss of job market access were slightly more confining than those articulated by Dr. Verst in his post-hearing deposition at which time he indicated that a permanent restriction to lift 35-50 pounds only occasionally would be appropriate. Mr. Crum indicated that Claimant would be precluded from most truck driving positions, but Dr. Verst felt that a cervical fusion did not automatically preclude someone from returning to work as a truck driver and that, from an objective standpoint, there was nothing associated with Claimant's surgery that would prevent her from returning to truck driving.

72. Claimant did not establish permanent disability in excess of her 17% PPI as a result of her injury of December 31, 2003.

73. **Apportionment.** Because Claimant does not have disability in excess of impairment, apportionment pursuant to Idaho Code § 72-406 is moot.

74. **AWW.** Napa Auto was the only party to request a finding on AWW and these findings pertain only to the September 6, 2000 claim. It is undisputed that Claimant earned \$6

per hour during the 10 weeks she worked for Napa Auto prior to the injury of September 6, 2000. Napa Auto asserts that there “appears to be no real dispute that the Claimant did not work full-time, but worked 30-40 hours a week periodically.” (Napa Auto’s Post-Hearing Brief, p. 15). Claimant’s Notice of Injury completed on September 6, 2000 reflects that she worked 30-40 hours per week. (Claimant’s Exhibit 1, p.1). However, a Notice of Injury completed by Duane (last name illegible) with Employer on the following day reflects that Claimant worked 40 hours per week. (Claimant’s Exhibit 1, p.1). The Complaint filed in August of 2005 alleges an AWW of \$240 which is consistent with earning \$6 per hour for a 40-hour work week. (Claimant’s Exhibit 2, p.1).

75. Neither party offered payroll documentation to clarify Claimant’s actual earnings and/or hours worked per week during her employment with Napa Auto. Claimant was employed by Napa Auto less than twelve calendar weeks preceding her injury. Insufficient evidence was presented regarding Claimant’s actual hours worked or wages earned to permit a calculation pursuant to Idaho Code § 72-419(4)(b) reflecting wages fixed by the hour and/or to determine when and to what extent Claimant worked less than 40 hours per week. Claimant’s gross wages reported to the Internal Revenue Service (IRS) for 2000 are \$16,027 which translates to an average of \$308.21 per week for 52 weeks, but it is impossible to ascertain how much Claimant earned during any specific 13 week period during the 52 weeks preceding her injury of September 6, 2000. (Exhibit 2 to Crum’s Deposition). The most appropriate wage calculation, based on evidence presented, is to rely upon information provided by Napa Auto that Claimant earned \$6 per hour for 40 hours of work per week, resulting in an AWW of \$240 pursuant to Idaho Code § 72-419(1) reflecting wages that are fixed by the week.



## **CONCLUSIONS OF LAW**

1. Claimant sustained a lumbar spine sprain/strain as a result of her industrial injury of September 6, 2000 which resulted in 5% PPI with no disability in excess of impairment.
2. Claimant sustained a cervical spine strain/sprain and a right shoulder strain/sprain as a result of her industrial injury of October 16, 2002 which did not result in permanent impairment or disability.
3. Claimant's industrial injury of December 31, 2003 aggravated her pre-existing cervical spine condition and necessitated Claimant's cervical surgery of July 7, 2004.
4. Claimant has 17% PPI attributable to the December 31, 2003 injury.
5. Claimant does not have disability in excess of impairment.
6. Apportionment pursuant to Idaho Code § 72-406 is moot.
7. Claimant's average weekly wage (AWW) for the September 6, 2000 injury is \$240.

## **RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 8 day of April 2008.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

KATHY BURNETT,	)	
	)	
Claimant,	)	<b>IC 2000-029057</b>
	)	<b>IC 2002-521908</b>
v.	)	<b>IC 2004-500545</b>
	)	
NAPA AUTO SUPPLY, Employer, and	)	
STATE INSURANCE FUND, Surety,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
CUMMINS FARMS, INC., Employer,	)	
And STATE INSURANCE FUND, Surety,	)	<b>ORDER</b>
	)	
and	)	
	)	
AUSTINS EXPRESS, INC., Employer,	)	April 16, 2008
And LIBERTY NORTHWEST	)	
INSURANCE CORPORATION, Surety,	)	
	)	
Defendants.	)	
_____	)	

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with the proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant sustained a lumbar spine sprain/strain as a result of her industrial injury of September 6, 2000 which resulted in 5% PPI with no disability in excess of impairment.
2. Claimant sustained a cervical spine strain/sprain and a right shoulder strain/sprain as a result of her industrial injury of October 16, 2002 which did not result in permanent impairment or disability.
3. Claimant's industrial injury of December 31, 2003 aggravated her pre-existing cervical spine condition and necessitated Claimant's cervical surgery of July 7, 2004.
4. Claimant has 17% PPI attributable to the December 31, 2003 injury.
5. Claimant does not have disability in excess of impairment.
6. Apportionment pursuant to Idaho Code § 72-406 is moot.
7. Claimant's average weekly wage (AWW) for the September 6, 2000 injury is \$240.
8. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this \_\_16\_\_ day of \_\_April\_\_\_\_\_, 2008.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Kile, Chairman

\_\_\_\_participated but did not sign\_\_\_\_  
R. D. Maynard, Commissioner

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_16\_\_ day of \_\_April\_\_\_\_, 2008, a true and correct copy of the foregoing **Findings, Conclusions and Order** was served by regular United States Mail upon each of the following persons:

DENNIS R PETERSEN  
P O BOX 1645  
IDAHO FALLS ID 83403-1645

NEIL D MCFEELEY  
P O BOX 1368  
BOISE ID 83701-1368

RUSSELL E WEBB  
P O BOX 51536  
IDAHO FALLS ID 83405

W SCOTT WIGLE  
P O BOX 1007  
BOISE ID 83701

jc

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_